

FKW, Incorporated and Local Union 1141, International Brotherhood of Electrical Workers, AFL-CIO, Petitioner. Case 17-RC-10798

August 31, 1992

ORDER DENYING REVIEW

BY MEMBERS DEVANEY, OVIATT, AND
RAUDABAUGH

The Board has delegated its authority in this proceeding to a three-member panel, which has considered the Employer's request for review of the Regional Director's Decision and Direction of Election (relevant portions of which are attached). The request for review is denied as it raises no substantial issues warranting review.¹

MEMBER DEVANEY, dissenting.

I would grant the Employer's request for review.

¹ The only issue raised in the request for review is whether the Regional Director erred in asserting jurisdiction under the Board's decisions in *Res-Care, Inc.*, 280 NLRB 670 (1986), and *Long Stretch Youth Home*, 280 NLRB 678 (1986).

APPENDIX

¹ FKW, Incorporated (herein called the Employer) is a State of Oklahoma Corporation engaged in providing architectural engineering services; installation operation and maintenance services; operation of telephone, computer, and other information systems; and operation and installation of automated warehouse systems. The Employer maintains a facility at 900 West 63rd Street, Oklahoma City, Oklahoma, and currently is party to a contract with the Small Business Administration (SBA), administered by the Federal Aviation Administration (FAA), requiring the Employer to provide operation and maintenance services at the FAA's Mike Monroney Aeronautical Center in Oklahoma City, Oklahoma. This contract is subject to the requirements of the Service Contract Act of 1965, 41 U.S. 351, et seq.

² The Petitioner seeks an election in a unit consisting of all full-time and regular part-time operation and maintenance employees of the Employer employed at the Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma but excluding all electricians, office clerical employees, guards, and supervisors as defined in the Act.

The Employer and the Petitioner stipulated at hearing that the above-described unit is appropriate for collective bargaining. The parties also stipulated that the Employer meets the standards for the exercise of the Board's statutory jurisdiction. The Employer contends that under the policies set forth in *Res-Care, Inc.*, 280 NLRB 670 (1986) and *Long Stretch Youth Home, Inc.*, 280 NLRB 678 (1986) the Board should decline to assert discretionary jurisdiction over the Employer because of the extent to which the above exempt governmental entities control the employment conditions of the employees in the petitioned-for unit. It is noted that while the Petitioner has, since July 5, 1990, been the certified collective-bargaining representative of a unit of the Employer's electricians and electrician helpers employed at the Mike

Monroney Aeronautical Center (herein called the facility), no issue regarding jurisdiction was raised in the earlier representation case.

Section 2(2) of the Act exempts from the definition of an employer, "the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof" In *National Transportation Service*, 240 NLRB 565 (1979), the Board established as the test for determining whether to assert jurisdiction over a non-exempt employer doing business with an exempt entity, "whether the employer would be able to bargain effectively about the terms and conditions of employment of its employees" p. 565. Thereafter, the Board held in *Res-Care* that the decision to assert jurisdiction will turn not only on the extent of control retained by the employer over essential terms and conditions of employment, but also on the degree of control exercised by the exempt entity over labor relations. Thus, under the controlling test, where the employer retains sufficient control over wages, hours, and conditions of employment, including fringe benefits and labor policies, to enable it to bargain meaningfully with a labor organization as a representative of its employees, the Board will assert jurisdiction. *Long Stretch Youth Home, Inc.*, supra. An employer's control over wages is not decisive, and the Board may assert jurisdiction over an employer that ceded control of its wages to the exempt entity but maintained sufficient autonomy regarding fringe benefits and labor policies to enable it to bargain meaningfully with a labor organization. *Community Transit Services, Inc.*, 290 NLRB 1167 (1988). Further, the Board stated in *Dynaelectron Corporation*, 286 NLRB 302 (1987), that the Service Contract Act does not, in itself, bar meaningful bargaining. *Ebon Research Systems*, 302 NLRB 762 (1991).

The Service Contract Act applies to every contract with a value in excess of \$2,500 having a principal purpose of providing services to the Federal Government. Under the Service Contract Act, the Department of Labor (DOL) issues area wage determinations that set forth the minimum wages and fringe benefits to be provided to service employees in a locality, and all contracts with private employers to provide services to the government must meet these minimums.

The process whereby the Employer was selected as the contractor to provide the above-described services involved an initial Request for Proposal (ROP) issued by the FAA. This ROP set forth 41 job classifications and the skills for each classification, and specified a "core crew" of 67 employees including a 6 member administrative staff. Other than the fact that any bid (or proposal) would have to include wages and benefits which met or exceeded the minimums established by the DOL (as discussed above), the ROP did not specify any specific wages or benefits. The Employer, and all other entities submitting a bid, developed its own wage scale for each classification, including steps in each scale. Additionally, the Employer proposed which step in the scale it would use to actually pay during the first year. Once the FAA completed its consideration and awarded the contract to the Employer, the wage scale and benefits devised and proposed by the Employer became contractual terms. In future years of the five year contractual term, on an annual basis, the FAA reissues a new wage scale which incorporates the minimum wages and benefits as adjusted by DOL. Each wage step of each classification is adjusted by the same

amount the minimum rate was increased or decreased by DOL.

The contract began January 1, 1992. The contract is a "cost plus award fee" contract; i.e., it provides for the payment of the costs incurred by the Employer in providing the services plus an "award" to the Employer. The reimbursable costs covered by the contract are largely labor costs and are expressly defined in the contract. The monetary award paid to the Employer includes a base or minimum award for providing the services and a performance award that varies based upon the FAA's evaluation of the Employer's performance under the contract. Historically, the Employer has received 70-92% of the possible performance award. The contract is for an initial term of one year. The FAA has the unilateral right to retain the services of the Employer for additional one-year periods over the next four years. The contract includes a wage table which is identical to, and was established by, the Employer's bid. As set forth above, it specifies a minimum and maximum wage rate for each job classification and includes seven wage steps for each job classification, each step being based upon a set percentage increase over the preceding step. The contract also sets forth as proposed, the specific wage step that each classification of employee shall be paid during the first year of the contract. The contract provides that, after one year, employees are eligible for a "merit" wage increase of an additional wage step on the wage scale. Although the contract specifies standard operating procedures (SOP) which govern eligibility requirements and the appropriate procedures for the granting of such merit increases, it is the Employer that evaluates and approves employees for increases and creates an "approved list" of recommended merit increases. The Employer failed to present, and the record does not contain, any evidence regarding any review/approval which FAA may have over such "approved list." The wage table itself is changed each year to incorporate the most recent DOL wage determinations, and the corresponding changes in the wage steps are made. The wage table is apparently not subject to annual renegotiation.

In addition, to, and separate and distinct from the wage scales or merit increases, the contract provides the Employer with an incentive pay fund, the amount of which is determined by a fixed percentage of the direct labor hours employees work. The Employer uses this fund to give wage increases to employees. The Employer has total discretion in awarding such incentive wage increases. The record does not specify the amount in the incentive wage pool. However, the Employer acknowledged at hearing that the amounts available in the incentive wage pool were not insignificant. As a result of such incentive pay, employees may in fact be paid more than the figures set out in the contractual wage table.

The contract also specifies that employees receive pension benefits equal to 5% of their wages. The contract also specifies that employees receive annually 80 hours holiday pay, at least 80 hours vacation, and 8 hours personal leave. In addition, the contract specifies a formula (\$1.84 per hour X 1872 hours annually) that determines the amount that will be spent per employee for medical, dental, and disability insurance. The \$1.84 figure is the minimum benefit package determination made by the DOL and, thus, presumably changes annually. The various mix of benefits provided under this formula is not specified and is at the Employer's discretion.

The contract also expressly sets forth the social security, worker's compensation insurance, and federal and state unemployment insurance costs for each job classification.

Although the number of employees to be hired and their qualifications are set forth in the contract, the Employer may hire additional temporary employees subject to approval of the FAA's contracting officer. The Employer advertises, interviews, narrows down the candidates and ultimately selects specific employees for hire. It then sends copies of the recommended applicants' resumes and professional licenses to the FAA's contracting officer for review. The FAA's contracting officer may reject or approve the Employer's recommendation to hire an applicant. The hours of work are established by the contract. The Employer is also permitted to determine the shift start times for certain operations that are staffed around the clock. The Employer is permitted, at its sole discretion, to spend \$1,500 every thirty days on overtime work. Overtime expenditures in excess of \$1,500 require the approval of the contracting officer or his representative. The FAA's contracting officer is represented at the facility by a "contracting officer representative." The FAA also employs quality assurance specialists (QAS) who monitor and assess the work performed by the Employer's employees.

The QAS employed by the government issues work orders directly to the Employer's employees, and may designate which employee is to perform the work. The government maintains the contractual right to terminate any employee, and certain designated "essential personnel" cannot be terminated by the Employer without notification to and, presumably, approval from the contracting officer. The Employer has discretion in scheduling employees' vacations and issued a personnel handbook that covers, inter alia, attendance and drug use policies. There is no evidence that the FAA or any of its representatives were involved in the creation of the personnel handbook or that such attendance or drug use policies were mandated by the government or the contract.

Based upon a consideration of all the record evidence, I find it appropriate to assert jurisdiction in this matter based upon the principles set forth in *National Transportation*, supra. Although, like the contract in *Res-Care*, the Employer's contract sets forth minimum and maximum wage ranges for each job classification and specifies the specific wage rate to be paid employees in each classification; the Employer here has access to funds in the incentive pay pool which gives it discretion and flexibility in determining the actual wage rates of each employee. Thus, the Employer appears to have appreciable flexibility in determining the compensation of its employees by virtue of the funds in the incentive fund pool. The Board has held that the mere specification of minimum wage rates in a contract is not sufficient to show an Employer is unable to bargain with a labor organization regarding wages. *Long Stretch Youth Home*, supra; *Dynalectron*, supra.

Moreover, the contract provides that the Employer will accord employees various fringe benefits, with a total contribution of \$1.84 an hour. However, the contract does not specify what benefits the Employer must provide. As long as benefits valued at the total rate are maintained, the Employer is free to alter the mix of benefits. Although the contract provides for vacation, sick leave, and paid holiday benefits,

there is no showing that the Employer cannot alter the respective amounts of these benefits as long as the overall cost of benefits remains the same. Even assuming that the Employer is not free to change the respective amounts of vacation, sick leave, or holiday benefits, the Board held on similar facts, in *Dynaelectron Corporation*, supra, that an employer was able to engage in meaningful bargaining with regard to benefits when the employer had a choice of other benefits to provide.

The record also establishes that the Employer maintains control over its personnel or labor policies including the hiring, termination, evaluation of employees' job performance, selection of employees for merit wage increases, and the issuance of an employee handbook setting forth personnel and employment policies.

I note that the Service Contract Act, in itself, does not bar meaningful collective bargaining. On its face, the Service

Contract Act contemplates collective bargaining and provides for the consideration of collectively-bargained wages and benefits in the DOL wage determinations that are factors in the government contracts. *Dynaelectron*, supra, *Ebon Research Systems*, supra. I further note that the Employer has the burden of showing that it is so restricted by its contract with the Government that it cannot engage in meaningful collective bargaining with a labor organization. *Ebon Research Systems*, supra.

In sum, I find on this record that the Employer has not met its burden of demonstrating that it lacks sufficient autonomy to engage in meaningful bargaining; but, rather that the Employer retains sufficient control over the wages, benefits, and labor policies of the employees in the petitioned-for unit to enable it to bargain with a labor organization in a meaningful manner and that it is, therefore, appropriate for the Board to assert jurisdiction in this matter.